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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

Case No. A-142

GARY A. PARFITT, et al.,
Petitioners,

v.

COLUMBUS CORRECTIONAL FACILITY, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

1. The Supreme Court of Ohio held that the pre-termination procedures adopted by a maximum security prison were not a mandatory prerequisite to the removal of striking correction officers under state administrative law or the Due Process clause of the United States Constitution. Petitioners have requested this Court to determine if federal Due Process requires prison officials to accord these correction officers notice and hearing prior to discharge. This issue was not raised before the Ohio courts and cannot be decided at this stage of the proceedings by this Court. *Cardinale v. Lousiana,* 394 U.S. 437 (1969).

Petitioners have argued throughout the appellate levels of this case that the failure of Respondents to comply with an internal management rule providing for a pre-termination conference violated Due Process. This argument was based upon Petitioners' misconception that the striking employees

possessed a property interest in the operation of the rules and regulations of the Department of Rehabilitation and Correction. Petitioners have not argued to any Ohio court that Due Process required that a governmental employee conduct a pre-termination conference in the absence of a regulation granting such a hearing. Since this federal Due Process issue is before this Court for the first time, the Writ of Certiorari should not be granted.

2. Federal Due Process did not require that Petitioners be afforded a pre-termination hearing. Petitioners were removed from their positions because they engaged in an illegal work stoppage while serving as correction officers at a maximum security penal institution. The unrefuted evidence in the proceedings below demonstrated that Petitioners' conduct precipitated an "emergency situation" at the Columbus Correctional Facility. The governmental official responsible for preserving safety and security at the facility had no option but to remove the Petitioners immediately. His decision not to afford Petitioners a pre-termination opportunity to be heard is supported by a long line of decisions of this Court, the most recent of which is *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974).

3. The Supreme Court of Ohio held that under state administrative law, internal management disciplinary rules are not mandatory unless the employee is a member of the class which the rule was intended to benefit. Since the Departmental Rule in the present case did not clearly grant the Petitioners a right to a pre-termination conference pursuant to state law, the Departmental procedure would not be presumed to be a mandatory prerequisite to a removal action against an employee. This determination of the intent of the Rule by the Supreme Court of Ohio should not be disturbed by this Court. *Albertson v. Millard,* 345 U.S. 242 (1953).

Petitioners incorrectly argue that the internal management pre-termination procedure of Columbus Correctional Facility is a mandatory prerequisite to the removal of an employee pursuant to the Due Process clause of the United States Constitution. This argument is improper for it rests upon Petitioners' erroneous argument in the lower courts that a rule, in and of itself, may constitute a property interest. Respondents submit that Petitioners' "entitlement" was in their position of

employment and not in the operation of a rule. By engaging in an illegal state strike, Petitioners created an emergency situation at a maximum security prison. Their job entitlement was adequately protected during their impartial record hearing before the State Personnel Board of Review.

STATEMENT OF THE CASE

Petitioners were employed as correction officers by Columbus Correctional Facility,[1] a maximum security prison located in the city limits of Columbus, Ohio. This case arose when Petitioners engaged in a strike at the institution on May 8 and 9, 1978, and were removed from their positions in accordance with Ohio Civil Service Law.[2] The strike created an emergency situation at the institution requiring the Superintendent to take immediate measures to protect the safety of the surrounding community.[3]

Petitioners ignored demands from supervisors of the institution to return to work.[4] In addition, a temporary restraining order was issued by an Ohio court and posted at all entrances to the institution ordering Petitioners to cease the strike and to return to work immediately.[5] This Court order

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1. Hereinafter referred to as "institution."

2. Petitioners were removed pursuant to Section 124.34 of the Ohio Revised Code for neglect of duty and/or failure of good behavior. The full text of this statute is found at pages 144-149 of the Petitioners' Brief. References to the Appendix contained in Petitioners' Brief shall be designated "App. of P.".

3. The Superintendent declared an emergency and placed the institution on twelve hour shifts. Vacation leaves and days off were cancelled; routine medical treatments were postponed. (Record 41, hereinafter referred to as "R."). Several officers worked over fifty hours during this emergency. (R. 42). One thousand three hundred and fifty (1,350) inmates were housed at the institution during this time period. (R. 40).

4. The first notice was given at 10:55 a.m. on May 8, 1978, when the Superintendent directed two officials of the Department of Rehabilitation and Correction to tell Petitioners that their action was illegal and to return to work. (R. 44). The second notice to return to work was given by the Custody Deputy of the institution at 2:45 p.m. on May 9, 1978. (R. 49).

5. R. 45-46.

was also ignored. The Superintendent of the institution, responsible for removing the employees, had "personal knowledge"[6] of the facts which led to the dismissal of the Petitioners.

While engaging in their illegal strike, Petitioners were responsible for a number of acts of coercion and intimidation. The delivery of prisoners to the instituion was prevented or delayed.[7] Petitioners also obstructed coal trucks,[8] intimidated visitors,[9] and attempted to physically prevent other correction officers from leaving or entering the instituion.[10] As a show of force, some of the Petitioners carried bats, sticks,[11] or were observed with dogs in the vicinity of the institution.[12]

As held by the Supreme Court of Ohio, the Petitioners did not contest the fact that proper procedures under Ohio law[13] were followed in their terminations.[14] Nor did Petitioners question in the lower court the sufficiency of the evidence of their own misconduct before the administrative body that reviewed the orders of removal.[15] The Petitioners complaint is that the Superintendent of the institution during this emergency situation failed to give the striking employees notice of the reasons for their dismissals and an opportunity to participate in a pre-termination conference in accordance with Ohio Adm. Code 5120-7-05(C)(3).[16]

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6. *Parfitt v. Columbus Correctional Facility*, 62 Ohio St.2d 434, 438 –N.E.2d– (1980); App. of P. 52.

7. R. 196.

8. R. 178.

9. *Id.*

10. R. 166, 171, 173, 178, 181, 185.

11. R. 48, 183.

12. R. 170.

13. *See*, Ohio Rev. Code Sect. 124.34, App. of P. 144-149.

14. *Parfitt, supra*, n. 6, 62 Ohio St.2d at 435; App. of P. 45.

15. *Id.* at 438; App. of P. 51.

16. Hereinafter referred to as "Departmental Rule." The origin of this Departmental Rule as determined by the Supreme Court of Ohio is fully discussed, *infra*, note 35. The full text of this Rule is found at App. of P. 150-167.

The manner in which this case has been appealed as discussed in the Petition for Writ of Certiorari is accurate. Respondents dispute, however, Petitioners' assertion in the Statement of the Case that the federal question raised in the Petition (Question A, Part A) was properly raised in state court so as to give this Court jurisdiction to review the judgment of the Supreme Court of Ohio on Writ of Certiorari.

ARGUMENT

I.

THE FEDERAL CONSTITUTIONAL ISSUES RAISED BY PETITIONERS ARE NOT PROPERLY BEFORE THIS COURT.

A. PETITIONERS FAILED TO RAISE IN STATE COURT THE ISSUE AS TO WHETHER FEDERAL DUE PROCESS REQUIRES THAT THE SUPERINTENDENT OF A MAXIMUM SECURITY PRISON ACCORD STRIKING EMPLOYEES NOTICE AND AN OPPORTUNITY TO A PRETERMINATION HEARING.

It is a fundamental principle of law that the Supreme Court of the United States will not decide issues of law which were not previously raised in the lower state courts.[17] In the present case, one of the two questions that Petitioners request this Court to determine is whether federal due process requires that employees engaged in an illegal strike be accorded notice and hearing prior to discharge. Respondents submit that this issue was not presented to the Ohio Court of Appeals or the Supreme Court of Ohio and, therefore, should not be reviewed by the Supreme Court of the United States.

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17. *See, e.g., Cardinale v. Louisiana*, 394 U.S. 437 (1969).

Petitioners have consistently argued in the lower courts that they had a "valid expectency[18]" that the rules and regulations of the Department of Rehabilitation and Correction would be followed and the failure of the Department to adhere to a rule violated due process.[19] Petitioners reasoned that the existence of the Rule, in and of itself, constituted a property right which could not be ignored by a state agency without violating due process.

Petitioners have not submitted to any Ohio court the argument that public employees have a due process right to pre-termination notice and hearing in the absence of a regulation granting such a right. Indeed, Petitioners conceded that the Federal Constitution did not require a pre-termination conference in all cases, but added that a conference was required when the rules of the Department provided for one.[20]

The decision of the Supreme Court of Ohio addressed the specific issue raised by Petitioners that adherence to the *procedure* adopted by the Department of Rehabilitation and Correction was not required under the Due Process clause of the United States Constitution. Petitioners failed to raise the issue as to whether a pre-termination conference was required in the absence of a regulation granting such a hearing. Further evidence indicating that the proposition of law contained in question A of the Petition was not raised before the Supreme Court of Ohio is gleaned through an examination of the Court's

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18. App. of P. 199.

19. The Brief of Petitioners in the Supreme Court of Ohio, stated: "Appellants do, however, maintain that the Federal Constitution does guarantee such a conference when a state regulation provides for one. It is clear, therefore, that the Appellees possess a property interest in the operation of the Rules and Regulations; and that the interference with that expectancy is a violation of their due process rights." App. of P. 202.

20. The Brief of Petitioners in the Supreme Court of Ohio, stated: "Appellees respectfully suggest the Rules and Regulations here provide for that expectancy and that the Rules and Regulations defined the terms and conditions of their continued employment and that they would be followed by the Department. Appellees, therefore, argue that their removals, conducted in violation of these expectancies, is a violation of their due process rights." App. of P. 208. Petitioners argument in the Ohio Court of Appeals was almost identical to the argument contained in the brief before the Supreme Court of Ohio. App. of P. 189-198.

syllabus. Under Ohio law, the syllabus of the Supreme Court states the relevant propositions of law for which the decision may be cited.[21] There is absolutely no reference to the Due Process issue found in the syllabus written by the Supreme Court of Ohio in *Parfitt v. Columbus Correctional Facility.*[22]

The syllabus clearly reveals that the decision of the Supreme Court of Ohio was based upon state administrative law and not federal Due Process.

Based upon the failure of the Petitioners to raise the Constitutional Due Process issue in the lower courts, it is respectfully submitted that this Court should not grant the Writ of Certiorari.

B. THE DECISION OF THE SUPREME COURT OF OHIO THAT FEDERAL DUE PROCESS DID NOT REQUIRE A PRE-TERMINATION HEARING IN THIS CASE COMPORTS FULLY WITH THE DECISIONS OF THIS COURT HOLDING THAT PRE-DEPRIVATION HEARINGS ARE NOT REQUIRED IN EMERGENCY SITUATIONS.

Respondents concede that the Petitioners had a protected property interest in continued public employment by virtue of Section 124.34 of the Ohio Revised Code[23] which provides that a classified civil service employee may not be removed except for cause. That same statute entitles an employee who is removed from employment to certain procedural safeguards, including a right to appeal his removal to an impartial tribunal and a right to a full evidentiary hearing within thirty days. Petitioners took advantage of the procedural safeguards provided, and have not questioned the adequacy of these post-termination procedures.[24] Rather, Petitioners contend that they were also

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21. *State v. Wilson,* 58 Ohio St.2d 52, 388 N.E.2d 745 (1979).

22. *supra,* n. 6.

23. App. of P. 144-149.

24. *Parfitt, supra,* n. 6, 62 Ohio St.2d at 435; App. of P. 44.

entitled to an opportunity to be heard prior to termination. It is clear from a long line of decisions of this Court that a pre-termination hearing was not constitutionally required in this case because Petitioners' conduct had caused an emergency situation at Columbus Correctional Facility.[25]

This Court has stated that Due Process "is not a technical conception with a fixed content unrelated to time, place, and circumstances",[26] but rather, "is flexible and calls for such procedural protections as the particular situation demands."[27] In *Mathews v. Eldridge,*[28] this Court announced a general formula to be applied in determining what process is due in a particular situation. What process is due depends upon the balance of three distinct factors: The private interest that will be affected, the risk of an erroneous deprivation, and the government's interest in summary action. Applying this formula to the particular facts in this case, a court would be compelled to conclude that the balance was overwhelming in favor of the State's interest.

The Petitioners' interest in this case was the continuation of their employment pending an evidentiary hearing, which under Ohio law was required to be held within thirty days from their notice of appeal. Petitioners' actual injury, however, would have been limited to a temporary interruption of income, since under Ohio law the Petitioners would have been entitled to back pay had they prevailed on the merits of their claim.[29]

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25. This Court has traditionally recognized that a pre-deprivation opportunity to be heard is not consitutionally required in emergency situations involving a countervailing governmental interest of overriding significance. *See, e.g., Goss v. Lopez,* 419 U.S. 565 (1975) (removal of students who are disrupting the academic process); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974) (ex parte seizure of yacht allegedly used for smuggling); *Ewing v. Mytinger & Casselberry, Inc.,* 339 U.S. 594 (1950) (seizure of misbranded drugs); *Fahey v. Mallonee,* 332 U.S. 245 (1947) (emergency bank management); *Phillips v. Commissioner of Internal Revenue,* 283 U.S. 589 (1931) (effective tax collection); *Central Union Trust Co. v. Garvan,* 245 U.S. 554 (1921) (emergency action during wartime); *North American Cold Storage Co. v. City of Chicago,* 211 U.S. 306 (1908) (seizure of allegedly diseased poultry).

26. *Cafeteria Workers v. McElroy,* 367 U.S. 886, 895 (1961).

27. *Morrisey v. Brewer,* 408 U.S. 471, 481 (1972).

28. 424 U.S. 319, 335 (1976).

29. *Monaghan v. Richley,* 32 Ohio St.2d 190, 291 N.E.2d 462 (1972).

Thus, both the duration and the degree of any potentially wrongful deprivation of Petitioners' interest were minimal in this case.

In addition, the risk of an erroneous deprivation of Petitioners' interest was negligible. In this case, the governmental official responsible for removing the Petitioners "was familiar with the facts and had personal knowledge of the facts of these cases and was in a position to make a decision without having to rely upon the investigation made by his subordinates."[30] The State Personnel Board of Review expressly found that "[s] ince none of the [Petitioners] testified in their behalf or defended the charges against them except upon technical grounds, it does not appear that a [pre-termination] conference would have resulted in charges not being filed."[31] A pre-termination conference would, therefore, have been of little value.[32]

Balanced against the foregoing factors, the State's interest in protecting the safety of the public during an emergency was unquestionably overriding. The unrefuted evidence in the proceedings below showed that the Petitioners' illegal work stoppage precipitated an "emergency situation" at the Columbus Correctional Facility.[33] On the first day of the strike, only eighteen of the fifty-eight correction officers assigned to the institution reported for the first shift. One thousand three hundred fifty (1,350) inmates were housed at the instituion, a maximum security prison, during this emergency situation. The evidence presented in Petitioners' post-termination hearing showed that while engaging in their illegal strike, Petitioners were responsible for a number of acts of intimidation. At various times, Petitioners blocked entrances and prevented others from entering or leaving the facility. One correction officer had to force his way through the picket line in order to

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30. Decision of the State Personnel Board of Review, App. of P. 106. The Supreme Court of Ohio concurred that the Superintendent of Columbus Correctional Facility "had personal knowledge of the facts which led to the removals." *Parfitt, supra,* n. 6, 62 Ohio St.2d at 438; App. of P. 52.

31. Decision of the State Personnel Board of Review, App. of P. 106.

32. *See, Mackey v. Montrym,* 443 U.S. 1 (1979).

33. Decision of the State Personnel Board of Review, App. of P. 115.

report for work. A county sheriff sought admittance to the institution and was waived off by some of the Petitioners. Only after a second attempt did the sheriff gain admittance to the institution. Since it was conclusively determined in the proceedings below that the Petitioners' conduct precipitated an "emergency situation", the instant case falls well within the ambit of this Court's prior decisions holding that a pre-deprivation hearing is not constitutionally required in an emergency situation.[34]

Applying the *Eldridge* formula, a court could come to but one conclusion in the instant case. The State's interest in protecting a maximum security penal institution from serious disruption far outweighed the Petitioners' interest in avoiding a temporary interruption in income. Moreover, since the governmental official responsible for the Petitioners' discharge had personal knowledge of the precipitative facts, the risk of an erroneous deprivation of Petitioners' interest was virtually non-existent and additional pre-termination procedures would have had little value.

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34. Petitioners have asked this Court to consider numerous federal and state court decisions which have interpreted this Court's decision in ***Arnett v. Kennedy,*** 416 U.S. 134 (1974) to require notice and an opportunity to be heard prior to discharge. None of the cases cited by the Petitioners, however, involved an emergency situation analogous to that presented in this case.

Two of the cases cited by Petitioners did involve the removal of public employees for engaging in illegal strikes. In ***Rockwell v. Crestwood School District, Board of Education,*** 227 N.W.2d 736, 740 (Mich. 1975), app. dism. 427 U.S. 901 (1976), the Michigan Supreme Court concluded that, "a teacher, including a teacher on continuing tenure, who strikes in violation of [state law] may be disciplined without a prior hearing." The case is, therefore, supportive of Respondents' position. Petitioners also rely on ***Hortonville Education Association v. Hortonville Joint School District,*** 225 N.W.2d 658 (Wisc. 1975), cert. den. 427 U.S. 904 (1976). That case is distinguishable, however, in that there is nothing in the record therein to suggest that the strike precipitated an emergency situation.

II.

THE INTERNAL MANAGEMENT PROCEDURE OF A STATE AGENCY IS NOT MANDATORY AND DOES NOT VIOLATE DUE PROCESS WHEN NOT APPLIED.

THE PRE-TERMINATION PROCEDURES OF COLUMBUS CORRECTIONAL FACILITY WERE INTENDED TO PROVIDE THE SUPERINTENDENT WITH SUFFICIENT DISCIPLINARY INFORMATION PRIOR TO THE REMOVAL OF AN EMPLOYEE. THESE PROCEDURES ARE NOT A MANDATORY PREREQUISITE TO A DISCHARGE UNDER STATE ADMINISTRATIVE LAW AND DO NOT INVOLVE PRINCIPLES OF FEDERAL DUE PROCESS.

By an examination of state administrative law, the Supreme Court of Ohio determined that a Departmental Rule granting employees the opportunity to participate in a pre-termination conference was not a mandatory prerequisite to removal.[35] The Ohio Court stated that it was extremely questionable whether the striking employees were among the intended beneficiaries of the Departmental Rule, noting that the Rule could be viewed as a "procedure designed to enhance the fact finding process"[36] of the institution. The Court added that even if a rule was not intended to benefit members of the class asserting the failure to follow the rule, a showing of prejudice by the employee would ordinarily invalidate the removal action. No prejudice had been shown by the striking employees, however, and the orders of removal were affirmed.

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35. The Court reasoned that there were two distinct provisions of the Ohio Revised Code for promulgating and filing agency rules. Section 119.01(C) of the Ohio Revised Code provides for the adoption of regulations other than internal management rules. Departmental Rules filed under Section 111.15 of the Ohio Revised Code relate to internal management which do not affect private rights. (62 Ohio St.2d at 437; App. of P. 50). The Department of Rehabilitation and Correction promulgated and filed the pre-termination removal regulation pursuant to Section 111.15 of the Ohio Revised Code and thus, the Court held, the Department indicated an intent to adopt a rule concerning the internal management of the institutions under their control. The full text of Sections 111.15 and 119.01 of the Ohio Revised Code are found at App. of P. 125-137.

36. 62 Ohio St.2d at 437; App. of P. 48.

This Court has consistently held that it will not disturb a state court's finding of the intent of a statute.[37] Since the decision of the Supreme Court of Ohio was premised upon a determination of the intent of the Departmental Rule according to state law, there are no federal constitutional matters for this Court to review. The Supreme Court of Ohio simply used principles of state administrative law after concluding that the Departmental Rule was not intended to benefit the employees. A statement by the Supreme Court of Ohio certainly lends support to the proposition that the decision of that Court was based upon state administrative law. After concluding its discussion of the intent of the Departmental Rule and noting that the Petitioners had failed to demonstrate prejudice, the Court stated:

> Appellees argue that even if the rule is not interpreted as a mandatory prerequisite to their removals under *state administrative law,* the procedure, in providing a pre-termination hearing, is required under the Due Process clause of the United States Constitution. . . .[38]

Thus, the basis of the Court's decision was "state administrative law" and not federal Due Process.

The framework of analysis used by the Supreme Court of Ohio was essentially the same as the analysis used in *American Farm Lines v. Blackball Freight Service.*[39] *American Farm Lines* differentiated between agency rules designed to confer procedural benefits upon individuals and those rules which were intended primarily to facilitate the development of relevant information for use by the agency. Using the rationale of *American Farm Lines,* a Federal District Court held in *Van Teslaar v. Bender,* [40] that a Coast Guard rule which required

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37. *See, e.g., Albertson v. Millard,* 345 U.S. 242 (1953).

38. 62 Ohio St.2d at 438; App. of P. 52 (Emphasis added).

39. 397 U.S. 532 (1972).

40. 365 F.Supp. 1007 (Md. 1973).

an investigating officer in a disciplinary matter to advise plaintiff of the substance of a complaint and the opportunity to respond was not intended to confer procedural benefits on individuals. The Coast Guard regulations served as a tool of the investigating officer which enabled him to receive information.

The *American Farm Lines* and *Van Teslaar* decisions were based upon principles of administrative law and did not involve constitutional provisions. Similarly, the decision of the Supreme Court of Ohio in the instant case applied principles of state administrative law in addressing Petitioners' argument.[41]

The proposition that internal management procedures of an administrative agency are mandated by the federal constitution was rejected by the Sixth Circuit, Court of Appeals, in *Bates v. Sponberg.*[42] In *Bates,* a tenured faculty member at a university was dismissed, and the university failed to comply with its own rules pertaining to the descharge. The Court refused to adopt the argument that the rules of the university conferred upon plaintiff Due Process rights which could be

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41. Petitioners cite *Service v. Dulles,* 354 U.S. 363 (1957), and *Vitarelli v. Seaton,* 359 U.S. 535 (1959), in support of the proposition that internal discharge regulations are binding upon the adopting agency. (App. of P. 32-35). These cases form the core of what has been called the "Accardi Doctrine". *See, Accardi v. Shaughnessy,* 347 U.S. 260 (1954), and *Usery v. Board of Education of Baltimore County,* 462 F.Supp. 535 (Md. 1978). *Accardi* and its progeny have not been interpreted by any court to require invalidation of an otherwise lawful agency order which is issued in violation of internal agency rules. The case of *American Farm Lines, supra,* n. 39, demonstrates that the "Accardi Doctrine" does not apply if agency rules were designed to govern internal agency procedure rather than to protect the interest of some other party.

In addition, the "Accardi Doctrine" also requires the adverse party to demonstrate that they have been harmed by the agency's failure to comply with its own internal procedures. As stated in *Usery,* the "Accardi Doctrine" and analogous state and federal cases apply "only" in the following circumstances:

> . . .(1) [w]hen the agency's regulations are designed to protect the party dealing with the agency and (2) when the agency's departure from those regulations results in prejudice to that party. 462 F.Supp. at 547.

The present case does not involve the failure of an agency to exercise independent discretion which resulted in prejudice to the adverse party.

42. 547 F.2d 325 (6th Cir. 1976).

asserted in federal court. Violations of agency rules give rise to a federal cause of action, the court held, only when the agency's disregard of its rules results in a procedure which "in itself"[43] impinges upon Due Process rights.[44]

In the present case, the failure of the institution to hold a pre-termination conference did not "in itself"[45] impinge upon Due Process rights. Section 124.34 of the Ohio Revised Code[46] provided for a panoply of rights which Petitioners utilized at their impartial hearing before the State Personnel Board of Review.

It is submitted that Petitioners' argument is based upon a fundamental misunderstanding of "property interests" and the relationship between those interests and Due Process rights. Petitioners have maintained throughout the appellate levels of this case that the striking employees possessed a property interest in the operation of the Departmental Rule. Petitioners have concluded that the Federal Constitution guarantees a pre-termination conference when a state regulation provides for one.[47] Petitioners' argument is in error for the regulation, in and of itself, does not constitute the property interest. There is no authority for the proposition that an employee can possess a property interest in a regulation. The employee's property right is found in his job entitlement and not in a procedural rule. In the present case, the job entitlement of the striking employees was protected by the impartial hearing procedures of state law.[48] The failure of the institution to adhere to an internal management procedure was properly analyzed by the

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43. 547 F.2d at 329.

44. The Sixth Circuit then traced the development of *Accardi, supra,* n. 41, to demonstrate that the basis of the decision was a rule of administrative law and not the Due Process clause. The Court concluded that no constitutional violation was shown, for the mere departure from university regulations, standing alone, did not deprive plaintiff of any constitutional right.

45. *Bates, supra,* n. 42, 547 F.2d at 329.

46. App. of P. 144-149.

47. App. of P. 192, 208.

48. *See,* Ohio Rev. Code Sect. 124.34; App. of P. 144-149.

Supreme Court of Ohio in terms of administrative law. The cases of *Bullock v. Mumford,*[49] and *Little v. City of Jackson,*[50] cited by Petitioners, are easily distinguishable from the present case. *Bullock* and *Little* did not involve a strike by guards at a maximum security prison in full view of the official who would determine the disciplinary penalty. Further, as Petitioners apparently concede, any discussion by these courts of pre-termination requirements was merely *dicta.*[51]

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49. 509 F.2d 384 (D.C. Cir. 1974).

50. 375 So.2d 1031 (Miss. 1979).

51. In *Mumford,* the agency complied with its own rules. In *Little,* the Mississippi Supreme Court held that the Due Process issue had been waived, but deemed it "advisable" to address the pre-termination procedure of Mississippi municipalities. 375 So.2d at 1034.

CONCLUSION

Based upon the foregoing, the Respondents respectfully request that this Court deny Petitioners' Petition for a Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was sent by regular U.S. mail to Mr. John T. Conroy, 150 East Mound Street, Columbus, Ohio 43215; Susan G. Eisenman, 150 East Mound Street, Columbs, Ohio 43215; and David Jenkins, 285 Dorchester Avenue, Boston, Massachusets 02127 on the 17th day of November, 1980.

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